Rajim bin Jaafar & Anor v Irdawadi Salawadi, Head Warden (Head of Warden, Sekolah Menengah Kebangsaan Agama Kota Kinabalu) & Ors

HIGH COURT (KOTA KINABALU) — CIVIL APPEAL NOS BKI-12BNCvC-7/8 OF 2019 AND BKI-12ANCvC-12/8 OF 2019
AMELATI PARNELL JC
29 JULY 2021

Civil Procedure — Parties — Joinder of parties — Failure to include tortfeasors as defendants — Failure to include Government of Malaysia as co-defendant — Notice of application for leave to add Government of Malaysia as co-defendant and for leave to amend writ of summons — Discretion of court to add parties — Whether court should exercise discretion to add tortfeasors as defendants — Whether court should allow application to add Government of Malaysia as co-defendants — Government Proceedings Act 1956 ss 5 & 6 — Rules of Court 2012 O 15 r 6(2)

Civil Procedure — Pleadings — Amendment — Application to amend writ of summons — Delay in filing application to amend writ of summons — Whether there was reasonable explanation for delay — Whether application to amend writ of summons ought to be allowed

Tort — Negligence — Breach of duty — Plaintiffs' child was bullied in school — Plaintiffs filed action premised on negligence and breach of statutory duty against head of warden and principal of school — Failure to include tortfeasors as defendants — Whether there was duty of care on part of defendants — Whether there was breach of duty of care — Whether duty of care was discharged — Whether causation proven — Whether vicarious liability proven

The plaintiffs in the present appeals were the parents of a student ('the plaintiffs' child') who studied in Sekolah Menengah Kebangsaaan Agama Kota Kinabalu ('the school'). The plaintiffs had brought an action against the head of warden of the school ('the first defendant'), and the principal of the school ('the second defendants') for negligence and breach of statutory duty in relation to the act of bullying committed by several students against the plaintiffs' child on 17 June 2017 and 10 July 2017. The plaintiffs' action against the rest of the defendants ie, the director of Sabah Education Department ('the third defendant'), the chief of Islamic Education Sector of the Sabah Education Department ('the fourth defendant'), the director of Islamic Education of the Ministry of Education Malaysia ('the fifth defendant') and the Minister of

A Education ('the sixth defendant') was premised on vicarious liability. The plaintiffs had also filed a notice of application for leave to add the Government of Malaysia as co-defendant and that the plaintiffs be granted leave to amend their writ of summons. It ought to be noted that the said notice of application was filed after the trial had concluded. The sessions court judge ('the SCJ') had B dismissed both the plaintiffs' action as well as the plaintiffs' notice of application, hence, the present appeals. The plaintiffs submitted that the learned SCJ had erred in law and in fact: (a) in dismissing the plaintiffs' claim despite that the plaintiffs had proven the elements of negligence as per the statement of claim; (b) in holding that the first and second defendants had C discharged the burden in proving that they had taken reasonable and adequate measure to prevent bully case in the school by organizing the talk programmes about safety and discipline in the school and assigning wardens to be on duty every day.; (c) in holding that no finding and/or order shall be made against DW4 and DW5 as the plaintiffs failed to make the defendants' witness 4 and D 5 ('DW4' and 'DW5') as a party; (d) when rejecting the evidence of the minor on the bully incidents that happened to his roommate previously in the school despite the second defendant testified that bully incident on 17 June 2017 and 10 July 2017 were not the first happened in the said school; (e) in failing to consider the testimony of DW2 that he was instructed during the meeting of E Lembaga Sekolah to delete video of the bully incident on 10 June 2017 despite PW1 had insisted that DW2 to supply the copy of the said video for the purpose of police investigation; (f) in holding that the plaintiffs had failed to prove the case on the balance of probabilities against the first and second defendants; and (g) in holding that the third, fourth, fifth and sixth defendants F could not be held vicariously liable in the suit.

Held, affirming the SCJ's finding and dismissing both the appeals with no order as to costs:

G (1) The court agreed with the SCJ that the first and second defendants had provided sufficient supervision and reasonable care for the safety of all students including the plaintiffs' child by organising the programs and reminders and assigning wardens to be on duty everyday including the dates when the bullying incidents happened. The first and second H defendants had done all they possibly could to ensure the safety of the students. There was no evidence to show that they had neglected their duty nor being the tortfeasor. Their duty was not a duty of insurance against harm but only a duty to take reasonable care for the safety of the pupil. Hence, they had discharged their duty of care towards the I plaintiffs' child and the plaintiffs had failed to prove that they had breach the duty (see paras 21, 41–42 & 52).

(2) It was trite that the party was bound by its pleadings. Throughout the proceeding no application had been made by the plaintiffs in the present case to add DW4 and DW5 as defendants to the proceeding. Further, the

issues raised by the plaintiffs before the trial were confined on the liability of the first and second defendants and the vicarious liability of the rest of the defendants. Indeed, the plaintiffs had all avenue to prove its case and bring the party ie, the tortfeasor to the proceeding that the plaintiffs had waived. The plaintiffs could not now blame it back to the court not exercising its discretion to add any persons as a party when the plaintiffs itself chose not to do so. Therefore, it was clear that the learned SCJ had discretion to exercise under O 15 r 6(2) of the Rules of Court 2012 when only it thinks just. In this case, the learned SCJ had acted on her discretion by not adding any persons as a party to the suit (see paras 57–59, 61 & 63).

(3) Though DW1 testified that bully incidents were not the first to happen in the school, it was unclear from the minor's testimonies whether the minor actually saw the incident of his roommate being bullied or being told about the incident. The best evidence would be from the minor's roommate. Hence the learned SCJ was correct in her finding when she said that 'the plaintiffs did not call the said roommate or his parents to support the plaintiffs' allegation'. In relation the issue of the said deleted video, the learned SCJ had the opportunity at first instance in assessing the evidence and demeanour of all the witnesses before her. It was the learned SCJ's finding of fact on this issue and the appellate court should be slow in interfering the finding of fact by the trial judge unless there was an error (see paras 66 & 75).

(4) The law requires a causal connection between breach of duty and injury suffered before liability is established in an action for negligence. In the present case, the plaintiffs did not name the actual tortfeasors ie, the students, but had named the head warden and headmaster instead. The first defendant and the second defendant were not the persons who had caused injuries to the minor. The failure to name the tortfeasors (the students) in this suit had made the plaintiffs' claim herein collapsed ab initio. In relation to vicarious liability, this issue was subjected totally to ss 5 and 6 of the Government Proceedings Act 1956 ('the GPA') whereby the Government of Malaysia must be named in this suit and only then the issue of vicarious liability could be determined. Hence the third, fourth, fifth and sixth defendants could not be held vicariously liable in this suit (see paras 76, 79 & 83).

(5) The application to amend writ or pleading was not as a matter of a right of a party but it was left to the court's discretion to decide. In the present case, the plaintiffs made the application to amend the statement of claim at the advanced stage of the court proceeding in that after the witnesses had testified and parties had closed their case. The courts in Malaysia had consistently held that where there was a delay in making an amendment application, the onus was on the applicant to furnish a reasonable

explanation for such a delay. The plaintiffs' failure to explain the delay and to comply the mandatory requirement under ss 5 and 6 of the GPA was clearly a tactical manoeuvre to defeat the defendants' stand in saying that the plaintiffs failed to comply with the requirement of mandatory/substantive and principle of trite law. The SCJ was therefore correct in dismissing the notice of application (see paras 87, 90–91 & 95–96).

[Bahasa Malaysia summary

Plaintif-plaintif dalam rayuan ini adalah ibu bapa kepada seorang pelajar ('anak plaintif-plaintif') yang belajar di Sekolah Menengah Kebangsaan Agama Kota Kinabalu ('sekolah tersebut'). Plaintif-plaintif telah memfailkan tindakan terhadap ketua warden sekolah ('defendan pertama'), dan pengetua sekolah ('defendan kedua') di atas kecuaian dan pelanggaran kewajipan berkanun berhubung dengan perbuatan buli yang dilakukan oleh beberapa pelajar terhadap anak plaintif-plaintif pada 17 Jun 2017 dan 10 Julai 2017. Tindakan plaintif-plaintif terhadap defendan-defendan yang lain iaitu Pengarah Jabatan Pendidikan Negeri Sabah ('defendan ketiga'), Ketua Sektor Pendidikan Islam, Jabatan Pendidikan Negeri Sabah ('defendan keempat'), Pengarah Bahagian Pendidikan Islam Kementerian Pelajaran Malaysia ('defendan kelima') dan Menteri Pendidikan ('defendan keenam') adalah bersandarkan kepada liabiliti vikarius. Plaintif-plaintif juga telah memfailkan notis permohonan bagi memohon kebenaran untuk menambah Kerajaan Malaysia sebagai defendan bersama dan plaintif-plaintif diberikan kebenaran untuk meminda writ saman mereka. Perlu diingatkan bahawa notis permohonan tersebut telah difailkan selepas perbicaraan selesai. Hakim mahkamah sesyen ('HMS') telah menolak kedua-dua tindakan plaintif-plaintif dan juga notis permohonan plaintif-plaintif, justeru, rayuan semasa. Plaintif-plaintif berhujah bahawa HMS yang bijaksana telah terkhilaf dari segi undang-undang dan fakta: (a) dalam menolak tuntutan plaintif-plaintif walaupun plaintif-plaintif telah membuktikan unsur-unsur kecuaian seperti dalam pernyataan tuntutan; (b) apabila menyatakan bahawa defendan pertama dan kedua telah melepaskan beban dalam membuktikan bahawa mereka telah mengambil langkah yang munasabah dan mencukupi untuk mencegah kes buli di sekolah dengan menganjurkan program ceramah tentang keselamatan dan disiplin di sekolah dan menugaskan warden untuk bertugas setiap hari; (c) apabila memutuskan bahawa tiada dapatan dan/atau perintah boleh dibuat terhadap DW4 dan DW5 kerana plaintif-plaintif gagal menjadikan saksi defendan 4 dan 5 ('DW4' dan 'DW5') sebagai pihak dalam kes; (d) apabila menolak keterangan kanak-kanak bawah umur berkenaan kejadian buli yang menimpa rakan sebiliknya sebelum ini di sekolah tersebut walaupun defendan kedua memberi keterangan bahawa kejadian buli pada 17 Jun 2017 dan 10 Julai 2017 bukanlah yang pertama berlaku di sekolah tersebut; (e) kerana gagal mempertimbangkan keterangan DW2 bahawa dia telah diarahkan semasa mesyuarat Lembaga Sekolah untuk memadam video kejadian buli pada 10 Jun

2017 walaupun PW1 telah memaksa DW2 agar membekalkan salinan video tersebut untuk tujuan siasatan polis; (f) apabila berpendapat bahawa plaintif-plaintif telah gagal membuktikan kes atas imbangan kebarangkalian terhadap defendan pertama dan kedua; dan (g) apabila berpendapat bahawa defendan ketiga, keempat, kelima dan keenam tidak boleh dipertanggungjawabkan secara vikarius dalam saman tersebut.

Diputuskan, mengesahkan dapatan HMS dan menolak kedua-dua rayuan tanpa perintah berkaitan kos:

(1) Mahkamah bersetuju dengan HMS bahawa defendan pertama dan kedua telah menyediakan pengawasan yang mencukupi dan penjagaan yang munasabah untuk keselamatan semua pelajar termasuk anak plaintif-plaintif dengan menganjurkan program dan peringatan dan menugaskan warden untuk bertugas setiap hari termasuk pada tarikh-tarikh ketika kejadian buli tersebut berlaku. Defendan pertama dan kedua telah melakukan segala yang mereka mampu untuk memastikan keselamatan pelajar-pelajar. Tiada keterangan yang menunjukkan bahawa mereka telah mengabaikan kewajipan mereka dan tiada juga keterangan bahawa mereka adalah pelaku-pelaku tort. Kewajipan mereka bukanlah kewajipan insurans terhadap bahaya tetapi hanya kewajipan untuk menjaga keselamatan murid secara munasabah. Oleh itu, mereka telah menunaikan kewajipan berjaga-jaga terhadap anak plaintif-plaintif dan plaintif-plaintif telah gagal membuktikan bahawa mereka telah melanggar kewajipan (lihat perenggan 21, 41–42 & 52).

(2) Sudah menjadi undang-undang yang mantap bahawa sesuatu pihak itu terikat dengan plidingnya. Sepanjang prosiding tiada permohonan telah dibuat oleh plaintif-plaintif dalam kes ini untuk menambah DW4 dan DW5 sebagai defendan kepada prosiding. Selanjutnya, isu yang dibangkitkan oleh plaintif-plaintif sebelum perbicaraan adalah terhad kepada liabiliti defendan pertama dan kedua dan liabiliti vikarius defendan-defendan yang lain. Sesungguhnya, plaintif-plaintif mempunyai semua cara untuk membuktikan kesnya dan membawa pihak iaitu, pelaku-pelaku tort ke prosiding tetapi plaintif-plaintif telah mengenepikan cara-cara tersebut. Plaintif-plaintif kini tidak boleh menyalahkan kembali kepada mahkamah kerana tidak menggunakan budi bicaranya untuk menambah mana-mana individu sebagai pihak apabila plaintif-plaintif sendiri memilih untuk tidak berbuat demikian. Oleh itu, adalah jelas bahawa HMS yang bijaksana mempunyai budi bicara untuk melaksanakan A 15 k 6(2) Kaedah-Kaedah Mahkamah 2012 apabila ianya dianggap adil. Dalam kes ini, HMS yang bijaksana telah bertindak mengikut budi bicaranya dengan tidak menambah mana-mana individu sebagai pihak dalam saman tersebut (lihat perenggan 57–59, 61 & 63).

(3) Walaupun DW1 memberi keterangan bahawa insiden buli bukanlah yang pertama berlaku di sekolah tersebut, tidak jelas daripada keterangan kanak-kanak tersebut sama ada dia benar-benar melihat kejadian rakan sebiliknya dibuli atau diberitahu tentang kejadian tersebut. Keterangan terbaik adalah daripada rakan sebilik kanak-kanak tersebut. Oleh itu HMS yang bijaksana adalah betul dalam dapatannya apabila dia berkata bahawa 'plaintif-plaintif tidak memanggil rakan sebilik tersebut atau ibu bapanya untuk menyokong dakwaan plaintif-plaintif'. Berhubung dengan isu video yang dipadam tersebut, HMS yang bijaksana mempunyai kelebihan awal dalam menilai keterangan dan gelagat semua saksi di hadapannya. Ianya adalah dapatan fakta HMS yang bijaksana dalam isu ini dan mahkamah rayuan haruslah perlahan dalam mengganggu dapatan fakta oleh hakim bicara melainkan terdapat kesilapan (lihat perenggan 66 & 75).

(4) Undang-undang memerlukan hubungan sebab akibat antara pelanggaran kewajipan dan kecederaan yang dialami sebelum liabiliti dibuktikan dalam tindakan berasaskan kecuaian. Dalam kes ini, plaintif-plaintif tidak menamakan pelaku-pelaku tort yang sebenar iaitu pelajar-pelajar tersebut, tetapi sebaliknya menamakan ketua warden dan guru besar. Defendan pertama dan defendan kedua bukanlah orang yang telah menyebabkan kecederaan kepada kanak-kanak tersebut. Kegagalan untuk menamakan pelaku-pelaku tort (pelajar-pelajar tersebut) dalam saman ini telah menyebabkan tuntutan plaintif-plaintif di sini gagal daripada awal lagi. Berhubung dengan liabiliti vikarius, isu ini tertakluk sepenuhnya kepada ss 5 dan 6 Akta Prosiding Kerajaan 1956 ('APK') di mana Kerajaan Malaysia mesti dinamakan dalam saman ini dan barulah isu liabiliti vikarius boleh ditentukan. Oleh itu defendan ketiga, keempat, kelima dan keenam tidak boleh dipertanggungjawabkan secara vikarius dalam saman ini (lihat perenggan 76, 79 & 83).

(5) Permohonan untuk meminda writ atau pliding bukanlah hak sesuatu pihak tetapi ia diserahkan kepada budi bicara mahkamah untuk membuat keputusan. Dalam kes ini, plaintif-plaintif membuat permohonan untuk meminda pernyataan tuntutan di peringkat akhir prosiding mahkamah iaitu selepas saksi-saksi memberi keterangan dan pihak-pihak telah menutup kes mereka. Mahkamah-mahkamah di Malaysia secara konsisten memutuskan bahawa apabila terdapat kelewatan dalam membuat permohonan pindaan, pemohon bertanggungjawab untuk memberikan penjelasan yang munasabah bagi kelewatan tersebut. Kegagalan plaintif-plaintif untuk menjelaskan kelewatan tersebut dan untuk mematuhi keperluan mandatori di bawah ss 5 dan 6 APK jelas merupakan gerakan taktikal untuk menafikan pendirian defendan-defendan yang mengatakan bahawa plaintif-plaintif gagal mematuhi keperluan mandatori/substantif dan prinsip undang-undang yang mantap. Oleh itu, HMS adalah betul dalam

menolak notis permohonan tersebut (lihat perenggan 87, 90–91 & 95–96).]

Cases referred to

Ahmad Ikhwan bin Ahmad Fauzi (mendakwa melalui bapa dan sahabat wakilnya Ahmad Fauzi bin Abdullah) lwn Ahmad Safwan Hanim bin Mohd Fahimi dan lain-lain [2021] 7 MLJ 1, HC (distd)
Bernard v Attorney General [2005] 2 LRC 561, PC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)
Government of Malaysia & Ors v Jumat bin Mahmud & Anor [1977] 2 MLJ 103, FC (refd)
Haji Abdul Rahman v Government of Malaysia & Anor [1966] 2 MLJ 174 (refd)
Hong Leong Finance Bhd v Low Thiam Hoe and another appeal [2016] 1 MLJ 301, FC (refd)
Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor [1988] 3 MLJ 348; [1988] 1 CLJ Rep 606, HC (refd)
Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663; [2008] 2 MLRA 735, FC (refd)
Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors [1981] 2 MLJ 27, FC (refd)
RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)
Raphael Pura v Insas Bhd & Anor [2001] 1 MLJ 49, CA (refd)
Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors [1990] 3 MLJ 254, HC (refd)
Silvadurai a/l Kunnary & Anor v Pengetua Sekolah Rendah Jenis Kebangsaan Cina Chung Hwa Asahan, Muar, Johor & Ors [1996] MLJU 331, HC (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (folld)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213; [1983] CLJ Rep) 428, FC (folld)
Yeo Tin Sang v Lim Choo Kee [1961] 1 MLJ 23, CA (refd)

Legislation referred to

Civil Law Act 1956 s 11
Government Proceedings Act 1956 ss 5, 6
Rules of Court 2012 O 15 r 6, 6(2), 6(2)(b), O 18

Benazir Japiril Bandaran (with Siti Zawiyah) (Idrus & Tsai & Co) for the appellant.
Mohd Hafizi bin Abdul Halim (Senior Federal Counsel, Sabah State Attorney General's Chambers) for the respondent.

Amelati Parnell JC:

INTRODUCTION

[1] There are two appeals filed by the appellants in the court below against the decision of the learned sessions court judge in dismissing:

(a) the appellants' claim for the alleged negligence/in breach of the statutory duty against the first and second respondents in which the third, fourth, fifth and sixth respondents were said to be vicariously liable for the conduct of the first and second respondents with no order as to costs, registered under Appeal No BKI-12BNCvC-7/8 of 2019; and

(b) appellants' notice of application (encl 90) for leave to add Government of Malaysia as co-defendant and that the plaintiffs be granted leave to amend their writ dated 8 February 2018, which was filed after the trial had concluded, registered under Appeal No BKI-12ANCvC-12/8 of 2019.

[2] For the purpose of this appeals, the appellants will be referred to as the plaintiffs, whereas the respondents will be referred as the defendants. I will firstly deal with the plaintiffs' appeal registered under Case No BKI-12BNCvC-7/8 of 2019 where the plaintiffs' action against the defendants was dismissed with no order as to costs.

THE PLAINTIFFS' PLEADED CASE

[3] The plaintiffs' claims are arising from two incidents of bully happened on 17 June 2017 and 10 July 2017 to 13 years old minor, the son to the plaintiffs, who attended the boarding school of Sekolah Menengah Kebangsaan Agama Kota Kinabalu ('SMKAKK').

[4] As a consequent of the two bully incidents, the minor suffered 'soft tissue injuries' and was diagnosed with 'acute stress reaction'. Because of the trauma suffered by the minor, the plaintiffs brought the minor away from the school premises. On the 30 July 2017, the plaintiffs sent the minor back to the school SMKAKK to continue his education. They found out that the minor's cupboard at his room at the male students' dormitory was damaged and the minor's properties were stolen.

[5] The minor also had to be transferred out of SMKAKK. Further, it was also pleaded that the second plaintiff whom is the mother to the minor, was diagnosed with 'post-traumatic stress disorder'.

[6] The minor's injury was caused by the first and second defendants' negligence and/or breach of statutory duty.

[7] Particulars of negligence and/or breach of statutory duty as per para 22(a)–(e) of the plaintiffs' statement of claim are that:

(a) failed to take measure or adequate measure in supervising and ensuring students' discipline who are under their tutelage and inside the boarding school premises;

(b) failure to exercise any reasonable care to prevent injuries from being inflicted on the minor whilst being in the school premises;

(c) failure to ensure, at all material times, that wardens or adequate wardens or teachers are on duty to supervise students at the school dormitories and classrooms to prevent any incidents of bullying from happening and to prevent the minor from being bullied;

(d) failure to adequately ensure the student bullies are punished according to statutory requirements; and

(e) failure to take reasonable care for the safety of all students including the minor.

[8] Particulars of the minor's injuries and trauma are as follows:

(a) as per medical report dated 2 August 2017 by Jabatan Psikiatri dan Kesihatan Mental of Duchess of Kent Hospital, Sandakan, the minor is diagnosed with 'acute stress reaction'; and

(b) as per medical report dated 5 August 2017 by Kementerian Kesihatan Malaysia, Queen Elizabeth Hospital, the minor sustained pain over bilateral arm and thigh and is diagnosed with 'soft tissue injury'.

[9] Plaintiffs are claiming that: (i) the first and second defendants were negligent/in breach of the statutory duty; (ii) the third, fourth, fifth and sixth defendants are respectively vicariously liable for the conduct of the first and second defendants; (iii) the damages for the minor to be accessed by the court; (iv) the damages for the second plaintiff to be accessed by the court; (v) interest under s 11 of the Civil Law Act 1956 on the said sum at 8%pa from the date of the incident till the date of judgment; (vi) statutory interests; (vii) legal costs; (viii) costs; and (ix) further or better relief that the court deems fit to grant.

(refer to statement of claim, pp 1–13, Part A, record of appeal).

A THE DEFENDANTS' CASE

[10] The defendants denied all the particulars of negligence and/or breach of statutory duty in para 22(a)–(e) of the plaintiffs' statement of claim as quoted above. The defendants also pleaded in their statement of defence that all the defendants should not be named in this suit as the plaintiffs have no reasonable cause of action against all the defendants.

MEMORANDUM OF APPEAL

[11] In the amended memorandum of appeal re-dated on the 23 January 2020, the plaintiffs appeal the whole of the decision of the learned sessions court judge as follows:

(a) the learned sessions court judge had erred in law and fact in dismissing the plaintiffs' claim despite that the plaintiffs' had proven the elements of negligence as per the statement of claim;

(b) the learned sessions court judge had erred in law and fact in holding that the first and second defendants had discharged the burden in proving that first and second defendants had taken reasonable and adequate measure to prevent bully case in SMAKK by organising the talk programmes about safety and discipline in SMAKK and assigning wardens to be on duty every day;

(c) the learned sessions court judge had erred in law and fact in holding that no finding and/or order shall be made against DW4 and DW5 as the plaintiffs failed to make the defendants' witness 4 and 5 (DW4 and DW5) as a party;

(d) the learned sessions court judge had erred in law and fact when rejecting the evidence of the minor on the bully incidents that happened to his roommate previously in SMAKK despite the second defendant testified that bully incident on 17 June 2017 and 10 July 2017 were not the first happened in SMAKK;

(e) the learned sessions court judge had erred in law and fact in failing to consider the testimony of DW2 that he was instructed during the meeting of Lembaga Sekolah to delete video of the bully incident on 10 July 2017 despite PW1 had insisted the DW2 to supply the copy of the said video for the purpose of police investigation;

(f) the learned trial judge had erred in law and fact for holding that the plaintiffs had failed to prove the case on the balance of probabilities against the first and second defendants; and

(g) the learned trial judge had erred in law and fact for holding that the third, fourth, fifth and sixth defendants could not be held vicariously liable in the suit.

(see pp 61–65 of the supplementary record of appeal).

ANALYSIS

[12] It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence.

[13] The case of *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 at p 398; [1996] 4 CLJ 545 at p 550, is instructive on this issue. Gopal Sri Ram JCA (as he then was) delivering the judgment of the Court of Appeal held:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[14] In the present case, the learned sessions court judge had found that it is undisputed that the bully incidents did happen and the incidents happened twice on 17 June 2017 and 10 July 2017 respectively. During both bully incidents, the minor was assaulted, kicked and punched by the students mentioned by the plaintiffs in their statement of claim. It is also not disputed that the SMKAKK had conducted investigation relating to the incidents and made a finding that a total of 17 students were involved and had been punished accordingly by the Disciplinary Board of SMKAKK.

[15] The learned senior federal counsel had submitted on the plaintiffs failure to name the tortfeasor as the evidence shows that none of the students who had caused 'soft tissue injury' to the minor was name as the defendants in this suit although they were made known to both plaintiffs. It was submitted that the first and second defendants shall not be liable for tort of assault and battery committed by the students against the minor.

[16] Learned counsel on the other hand submitted that the cause of action in this appeal is negligence and/or breach of statutory duty against the principal and head of warden of school and not personal injury. The duty of care that is expected from a principal and warden towards the students is akin to that expected of a careful. This proposition in law is called the doctrine of 'in loco parentis'. And that the tortfeasors of the act of negligence were named since the

beginning of the suit, and they are the first and second defendants, namely, Irdawadi Salawadi and Taib bin Hj Abdullah.

[17] Premised on the plaintiffs' claim on negligence and/or breach of statutory duty against the defendants, it is imperative for the court to decide whether the learned sessions court judge had erred in law and fact as put forth in the memorandum of appeal.

[18] For claims enforceable by proceedings against Government, ss 5 and 6 of the Government Proceedings Act 1956 states that:

> 5 Liability of the Government in tort
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> Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.
>
> 6 Limits of liability of the Government
>
> (1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

[19] It is settled law on ss 5 and 6 of the Government Proceedings Act 1956 that in any claim in tort against the Government, the officer of the Government who was responsible for the alleged tortious act must be made a party and his responsibility be established before the Government can be made liable vicariously as principal (see *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1 at p 14 and *Haji Abdul Rahman v Government of Malaysia & Anor* [1966] 2 MLJ 174 at p 175).

[20] The learned sessions court judge had rightly said that the liability of the first and second defendants is subjected to certain test laid down by several settled case law, namely three essential ingredients must be fulfilled before the first and second defendants could be held liable, which are as follows:

(a) the existence of duty of care which was owed by the first and second defendants to the plaintiffs at the material time (duty of care);

(b) failure of the first and second defendants to attain that standard of care prescribed by law and thereby committing a breach of such duty of care (breach of duty); and

(c) damage which was both causally connected with such breach and recognised by law had been suffered by the minor (causation). A

DUTY OF CARE

[21] As to the first element on duty of care, the learned sessions court judge of the finding that 'although the first and second defendants owe duty of care towards the minor, the law does not put a strict liability on the first and second defendants as the school principal and head warden to SMKAKK. The duty of care of the first and second defendants to the minor must commensurate with their opportunity and ability to protect the minor from dangers that were known or that should be apprehended. This duty not being one to insure against injury, but to take reasonable care to prevent it'. B C

[22] This finding is premised on the settled case law where Raja Azlan Shah FCJ in the case of *Government of Malaysia & Ors v Jumat bin Mahmud & Anor* [1977] 2 MLJ 103 at p 104 laid down the doctrine of duty of care owed by the school authority as follows: D

> It is accepted that by reason of the special relationship of teacher and pupil, a school teacher owes a duty to the pupil to take reasonable care, for the safety of the pupil. The duty of care on the part of the teacher to the plaintiff must commensurate with his/her opportunity and ability to protect the pupil from dangers that were known or that should be apprehended and the duty of care required is that which a careful father with a very large family would take of his own children (see *Ricketts v Erith Borough Council* [1943] 2 All ER 629 at p 631). It is not a duty of insurance against harm but only a duty to take reasonable care for the safety of the pupil. The duty is aptly described by the learned Chief Justice of Victoria in the judgment of the Full Court in *Richards v State of Victoria* [1969] VR139 at p 141 when he said: E F
>
> > The duty of care owed by (the teacher) required only that he should take such measures as in all the circumstances were reasonable to prevent physical injury to (the pupil). This duty not being one to insure against injury, but to take reasonable care to prevent it, required no more than the taking of reasonable steps to protect the plaintiff against risks of injury which *ex hypothesi* (the teacher) should reasonably have foreseen. G

[23] Further it was quoted by Suriyadi J in the case of *Silvadurai a/l Kunnary & Anor v Pengetua Sekolah Rendah Jenis Kebangsaan Cina Chung Hwa Asahan, Muar, Johor & Ors* [1996] MLJU 331, as follows: H

> I further seek solace from the case of *Zazlin Zahira Hj Kamarulzaman (an infant) suing by his father and next friend, Hj Kamarulzaman b Mohd Ali lwn Louis Marie Neube RT Ambrose a/l Ambrose & 2 Yg Ln* [1994] (3) ANR 47 2518 at p 2519 under held 1 which reads: I
>
> > 1(a) Seorang guru bertanggungjawab menjaga keselamatan murid-murid di bawah jagaannya. Kewajipan berhati-hati ini mesti mengambil kira peluang dan

A kebolehan guru itu untuk melindungi murid-murid dari bahaya yang diketahui, dan tahap kewajipan ini adalah sama dengan kewajipan seorang bapa yang mempunyai anak ramai. Ia bukan kewajipan menjamin tidak akan berlaku kemalangan, tetapi sekadar kewajipan berhati-hati dengan munasabah untuk menjaga keselamatan murid-murid. Undang-undang tidak meletakkan
B tanggungjawab yang keras (*strict liability*) ke atas guru.

[24] Following the above authorities, the learned sessions court judge proceeded to consider the second element whether there is such *breach of duty* by the first and second defendants. Again reference was made to the decision by
C the Federal Court in *Jumat*'s case which held as follows:

> In considering whether or not the appellants were in breach of their duty of care to the respondent it was necessary for the trial judge to consider *first whether the risks of injury to the plaintiff were reasonably foreseeable and secondly assuming it was, whether the appellants took reasonable steps to protect the respondent against those risks.* (Emphasis added.)
D

[25] The learned sessions court judge was satisfied that the risks of being a bully victim in a boarding school like SMKAKK is reasonably foreseeable
E relying on the testimony of DW3 (the first defendant) at p 226 ROA, where he testified that:

> Q58: Saya rujuk kamu kepada Q & A 15 DWS3. Adakah kes buli selain daripada insiden buli pada 17.06.2017 dan 10.07.2017 di sekolah kamu pernah berlaku?
>
> A: Ya.
F

[26] I have no issue with the finding of the learned sessions court judge above.

G BREACH OF DUTY

[27] Next question is whether the first and second defendants took reasonable steps to protect the pupils including the said minor against this risk. The particulars of the alleged negligence and/or breach of statutory duty by the
H first and second defendants are as at para 22(a)–(e) of the statement of claim.

[28] Learned counsel submitted that negligence had been proven on the balance of probabilities. Reference was made to pp 826–827 of Part D, record
I of appeal, in which it is a flow chart of disciplinary administration at school in preventing bully cases. It was submitted that the first and second defendants' duty had not been discharged even if they assign and supervise wardens to be on duty at the dormitories or school and that only when the necessary action is taken which is by supervising the students, then the duty of care is discharged.

[29] It was further submitted by the learned counsel that the statutory duty of the first defendant as the *Ketua Warden* is that the students in the dormitories are his responsibility, he should always be aware of students' behaviour in dormitories, do investigation, responsible for ongoing monitoring of the students involved in the bully (bullies and victims). *Ketua Warden* is also responsible in ensuring hostel committee members provide information in the event of bullying happening in the hostel.

[30] Now, how much supervision is required of the first and second defendants in order to protect the students including the minor from the risks of injury whatever their source?

[31] In *Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors* [1981] 2 MLJ 27, Salleh Abas FCJ held at p 27 that:

> It is settled law that a school teacher is under a duty to exercise supervision over his pupils when they are in the school premises, either in the classroom or the playground. The degree of supervision depends on the circumstances of each case, such as the age of the pupils and what there are doing at the material time. If the teacher knows that the pupils are engaged in doing acts which are likely to cause injuries to one another, the teacher is under a duty to take steps to ensure the safety of the acts.

[32] Salleh Abas FCJ did adopt the principles in *Jumat*'s case but he opined at p 28 that:

> This is not a case where the teacher, as in the case of *Government of Malaysia & Ors v Jumat bin Mohamed & Anor* [1977] 2 MLJ 103, had provided sufficient supervision but could not prevent the injury from being inflicted because of the stupidity of a pupil, whose exuberant behaviour was unknown to the teacher. But this is a case where a teacher appreciating that the boys were handling dangerous instruments had not given sufficient warning as to their use nor had she taken steps to see that pupils were positioned within such distance between them as to avoid injuries from being inflicted. There is a world of difference between the use of changkol and that of a pencil.

[33] In the present case, the learned federal counsel submit that although the burden of proof on the balance of probability rests throughout the trial on the plaintiffs, the first and second defendants have led evidence that they have taken reasonable care and/or measures in ensuring students are following discipline and providing adequate measures to prevent bullying incidents in SMKAKK.

[34] The first defendant (DW3) in his witness statement (DWS3) stated that the school has taken measures to ensure the safety of pupils staying in the hostel by organising several programs as follows:

DWS3 — Pages 389–393 of ROA Part B:

S14: Boleh terangkan apakah langkah-langkah sekolah untuk memastikan keselamatan murid asrama?

J14: Langkah-langkah yang diambil oleh pihak sekolah untuk memastikan keselamatan murid asrama ialah:

1. Menganjurkan beberapa program keselamatan dan disiplin kepada murid asrama seperti:

   (a) Taklimat disiplin dan keselamatan asrama kepada murid asrama oleh Ketua Warden (2 januari 2017)

   (b) Program Perjumpaan Khas bersama Pegawai Perhubungan Polis Sekolah kepada semua murid (ANTI BULI) — 3 haribulan April 2017

   (c) Mengadakan pemeriksaan barang larangan kepada murid asrama secara berkala — 3 MAC 2017

   (d) Program Jom ke Sekolah dan pelancaran peti aduan disiplin dan taklimat anti buli oleh pegawai PDRM —16 FEBRUARI 2017

   (e) Program HI5 Spritual Jati Diri Pelajar SMKAKK (Pogram peningkatan Sahsiah di kalangan pelajar yang bermasalah) — 21 JANUARI 2017

   (f) Program Taklimat Anti Buli dari Pegawai Perhubungan Sekolah — ASP ABDUL SALAM — 3 haribulan Januari 2017

   [RUJUK: DBOD MUKA SURAT 95–116]

2. Memberi peringatan secara berterusan kepada murid berkaitan disiplin ketika perhimpunan sekolah.

3. Bekerjasama dengan ibubapa melalui PIBG untuk menganjurkan program-program disiplin.

4. Melantik pengawal keselamatan yang bertugas setiap 24 jam.

[35] The first defendant had also ensured that all wardens or adequate wardens or teachers were on duty to supervise students at the said dormitories and classrooms to prevent any bullies from happening and to prevent the minor from being bullied.

DWS3 — Pages 389–393 OF ROA Part B:

S15: Sebagai Ketua Warden, apakah langkah-langkah yang diambil untuk memastikan keselamatan murid asrama?

J15: Sebagai Ketua Warden saya mengambil beberapa langkah untuk memastikan keselamatan murid asrama seperti:

1. Mengadakan perjumpaan dan taklimat kepada warden asrama berkaitan kes buli untuk meningkatkan pemantauan.
2. Bekerjasama penuh dengan pihak pengurusan sekolah untuk menganjurkan program-program disiplin dan keselamatan pelajar.
3. Memberi peringatan dan amaran kepada pelajar asrama secara berterusan dalam perhimpunan dan perjumpaan sekolah.
4. Membuat pemeriksaan kepada pelajar asrama secara berterusan, memastikan lampu bilik dipadamkan jam 11pm yang diselia oleh warden bertugas.
5. Memudahkan murid asrama membuat aduan kepada warden sekiranya berlaku kecemasan, buli atau sakit iaitu memastikan warden yang tinggal berhampiran asrama untuk sentiasa bersedia bila-bila masa.

[36] These programs and reminders are indeed necessary to ensure the safety of the pupils and to demonstrate that the first and second defendants had taken reasonable care to prevent injuries from being inflicted on the pupils including the minor whilst being in the school premises and the dormitory.

[37] It is also in evidence that there were wardens on duty on both the days of the bully incidents but no complain had been received from the minor, plaintiffs or any student from SMKAKK that the minor was assaulted by a group of students.

DW3, during Cross-Examination testified that:

> Q.65: Adakah kamu setuju jika saya katakan kes buli yang berlaku pada 17.06.2017 dan 10.07.2017 telah berlaku dan minor dalam insiden tersebut iaitu Ridhwan tidak pernah membuat apa-apa aduan?
>
> A.65: Saya setuju.
>
> Q.68: Saya rujuk kamu kepada Q & A 66 NOP. Jadi mengapa kamu membuat tindakan untuk membantu siasatan dan membuat siasatan kes buli hanya selepas dimaklumkan mengenai kejadian buli tersebut dan tidak sebelum itu sedangkan kamu tahu bahawa kes buli boleh berlaku tanpa menerima sebarang aduan?
>
> A.68: Sebelum dimaklumkan, tidak ada sesiapa yang tahu kejadian tersebut. Jadi bagaimana tindakan hendak diambil.

(pp 268–269 ROA).

[38] DW3 during re-examination testified that:

> Q.6: Saya rujuk kamu kepada Q & A 54 di baris 9–13 di mukasurat 227 NOP dimana kamu telah ditanya:
>
> Q.54: Saya rujuk kamu kepada Q & A 14 DWS3.

A Setuju dengan saya jika saya katakan dengan menganjurkan program taklimat mengenai disiplin adalah tidak cukup untuk membanteras gejala buli di asrama? Dan jawapan kamu adalah:

A: Tidak setuju.

B Boleh kamu terangkan kepada Mahkamah jawapan kamu?

A: Program yang dianjurkan adalah cukup dan kami sebagai guru telah melakukan sebaik yang mungkin mengikut kemampuan kami dan insiden yang berlaku adalah di luar kawalan kami.

C Q.7: Saya rujuk kamu kepada Put57 di baris 10–12 di mukasurat 228 NOP dimana kamu telah ditanya:

Put.57: Saya katakan kepada kamu bahawa pihak sekolah gagal menjaga keselamatan pelajar di dalam asrama? Dan jawapan kamu adalah:

D A: Tidak setuju.

Boleh kamu terangkan kepada Mahkamah jawapan kamu?

A: Saya tidak setuju kerana taklimat SOP keselamatan asrama dibuat pada hari pertama persekolahan dan pelajar seharusnya tahu bahawa sekiranya berlaku apa-apa yang luar biasa aduan perlu dilakukan dan mereka tahu dimana tempat E untuk mereka mengadu dan kami juga mempunyai warden yang bertugas setiap hari.

Q8: Saya rujuk kamu kepada Q & A 66 di baris 7–10 di mukasurat 230 NOP dimana kamu telah ditanya:

F Q.66: Setuju dengan saya jika saya katakan warden seharusnya mempunyai kesedaran mengenai gejala buli boleh berlaku di asrama walaupun tidak menerima sebarang aduan? Dan jawapan kamu adalah:

A: Setuju.

G Boleh kamu terangkan kepada Mahkamah jawapan kamu?

A: Warden mempunyai kesedaran mengenai gejala buli boleh berlaku di asrama dan program yang kami laksanakan adalah pencegahan kepada gejala buli tetapi warden tidak boleh mengambil tindakan sekiranya tidak ada aduan mengenai ini kerana tidak mempunyai pengetahuan terhadap perkara tersebut.

H Q.9: Saya rujuk kamu kepada Put 73 di baris 1–6 di mukasurat 232 NOP dimana kamu telah ditanya:

Put73: Saya katakan kepada kamu bahawa gagal melakukan tugas kamu sebagai seorang Ketua Warden dalam memastikan bahawa pelajar-pelajar asrama berasa selamat menduduki asrama kerana kamu mengambil ringan isu ringan dan I hanya bertindak untuk menyiasat selepas menerima aduan? Dan jawapan kamu adalah:

A: Tidak setuju.

Boleh kamu terangkan kepada Mahkamah jawapan kamu?

A: Saya tidak setuju kerana Ketua Warden dan warden-warden lain telah berusaha sebaik yang mungkin untuk anak murid kami dan kami tidak pernah memandang ringan terhadap apa-apa masalah disiplin yang berlaku di asrama. Insiden yang berlaku adalah di luar kawalan kami sebagai manusia kerana kami tidak boleh berada di semua tempat pada setiap masa.

Q 10: Saya rujuk kamu kepaa Put 74 di baris 8–12 di mukasurat 232 NOP dimana kamu telah ditanya:

Put74: Saya katakan kepada kamu bahawa gagal dalam memastikan keselamatan yang cukup diberikan kepada semua pelajar asrama di Sekolah Menengah Kebangsaan Agama, Kota Kinabalu termasuklah minor Ridhwan? Dan jawapan kamu adalah:

A: Tidak setuju.

Boleh kamu terangkan kepada Mahkamah jawapan kamu?

A: Saya tidak setuju kerana kami telah mengambil semua langkah yang perlu seperti taklimat keselamatan dan disiplin asrama dan juga kami mempunyai warden yang bertugas serta pengawal keselamatan asrama yang berada 24 jam di asrama. Rumah guru juga berada 20 meter daripada kawasan asrama. Sekiranya berlaku kejadian seperti buli minor sepatutnya tahu dimana dia perlu membuat aduan.

(pp 274–277 ROA).

[39] Besides the school wardens, the first and second defendants had also provided an extra safety measure for SMKAKK students by engaging two security guards to be on duty 24 hours every day including the day of the incidents ie on 17 June 2017 and 10 July 2017. First defendant explained further in cross-examination that the school had two contracts for security guards, namely security guards for the school and security guards for the dormitory:

Put56: Saya katakan kepada kamu bahawa bukanlah menjadi tugas pengawal keselamatan untuk membuat rondaan di dalam asrama tetapi adalah tugas Ketua Warden dan warden-warden yang lain untuk membuat rondaan dan untuk memastikan semua pelajar dalam asrama selamat.

A: Saya tidak setuju kerana sekolah kami mempunyai dua kontrak pengawal keselamatan iaitu pengawal keselamatan sekolah dan pengawal keselamatan asrama.

(p 226 of ROA).

[40] It is also in evidence that the defendants had ensured the students that involved in bullied incidents against the minor are punished according to statutory requirements. The learned sessions court judge had address this in her grounds of judgment at pp 54–55 of Supplementary ROA.

[41] I therefore with the learned sessions court judge that first and second defendants had provided sufficient supervision and reasonable care for the safety of all students including the minor by organising the programs and reminders and assigning wardens to be on duty everyday including the dates when the bullying incidents happened.

[42] The first and second defendants had done all they possibly could to ensure the safety of the students. There is no evidence to show that they had neglected their duty nor being the tortfeasor. Their duty is not a duty of insurance against harm but only a duty to take reasonable care for the safety of the pupil (see *Government of Malaysia & Ors v Jumat bin Mahmud & Anor*). Hence they have discharged their duty of care towards the minor and that the plaintiffs have failed to prove that they have breached the duty.

[43] The learned sessions court judge had carefully considered the evidenced adduced on what really happened on 17 June 2017 and 10 July 2017 (pp 31–53 of Supplementary ROA). As to the first incident on 17 June 2017, the learned sessions court judge said that '... it is clear that DW6 was on duty together with Ustaz Fuad bin Zakaria on the first incident. This evidence tallies with his Laporan Harian Bertugas Exhibit D5. As the plaintiffs did not offer any other evidence or witness to prove otherwise, I am satisfied that the first and second defendants had discharged his duty by making sure that there are wardens on duty on 17 June 2019 namely DW6 and Ustaz Fuad bin Zakaria to supervise students at the school dormitories and/or school'.

[44] As to the second incidence on 10 July 2017 the wardens on duty were DW5 and Ustaz Halim. DW5 have prepared and signed a Laporan Harian Bertugas, exh D4. The learned sessions court judges has stated in her judgment (refer p 52 of the ROA):

> Based on the minor's testimonies above, DW5 and Ustaz Halim were the wardens on duty on that night should have aware that the lights were still on in the students' dormitory at 11.30 pm and should have taken the necessary action to supervise the students. Had they done so, it would have prevented the minor from being bullied.

[45] Further, at p 53 of the ROA, the learned sessions court judge had made a finding:

> Having said that, DW5 and Ustaz Halim were not named as the defendants in this action. Hence, no finding and/or order shall be made against them and/or order as to whether they are responsible for the alleged tortious act.

[46] With reference to the case of *Ahmad Ikhwan bin Ahmad Fauzi (mendakwa melalui bapa dan sahabat wakilnya Ahmad Fauzi bin Abdullah) lwn Ahmad Safwan Hanim bin Mohd Fahimi dan lain-lain* [2021] 7 MLJ 1 referred

to by the plaintiffs herein, it is noted that the tortfeasors (the bullies) were named as first to fifth defendants and the warden on duty that night of the incident namely, SD13, were also named as the sixth defendant which was not the case in the present appeal and suit before the trial court. This was the very argument by the defendants from the beginning on the failure of the plaintiffs to name the tortfeasor, as the evidence shows that none of the students who was said had caused 'soft tissue injury' to the minor was name as the defendants in this suit although they were made known to both plaintiffs neither were the wardens on duty on day of incidents 17 June 2017 and 10 July 2017 were named by the plaintiffs.

[47] With due respect, there is no issue that the defendants seeks to escape liability by diverting the issue of the appeal and the cause of action as submitted by the plaintiffs. As regard to the previous application by the defendants under O 18 of the Rules of Court 2012 on the 30 November 2018 to strike out the plaintiffs' case, it was dismissed on the basis that there were triable issues. The merits of the case have not been decided then to ascertain the liabilities of the first and second defendants in which the third, fourth, fifth and sixth respondents were said to be vicariously liable.

[48] As pointed out by the learned federal counsel for the defendants, in *Ahmad Ikhwan*, the court made the finding that the tortfeasors @ bullies (first to fifth defendants) were liable for all acts committed against the plaintiff. In our case, no person was found liable. Although the sessions court made a finding that bullying incidents occurred, nevertheless no individual or individuals are singled out to be the person/persons whom has caused injuries to the minor. Neither the first or second defendants was at the scene during the incidents. Indeed, such finding is not sufficient to implicate liability for causing injuries to the minor. The first defendant and second defendant are the head of warden and the school's principal respectively. It is not the first defendant or the second defendant that causes injuries to the minor. So to implicate liability upon the first and second defendants of the minor's injuries is a misconceived fact and law, and an error of judgment. The real bullies are the individuals who were ought to be found liable for the minor's injuries. Unfortunately, the bullies/tortfeasors were not named as parties to this suit.

[49] Further, in *Ahmad Ikhwan*, the head prefect and assistant head prefect had conspired in the act even though they did not take an active role. The incident occurred on full consciousness. Contradictory to our instant case, the first and second defendants have never conspired for the minor to be bullied, let alone to allow injuries to be inflicted upon the minor. The incident occurred without the knowledge of the first and second defendants. Had the first and second defendants were aware of such incident, a pre-emptive action would have been in place to end such unscrupulous behaviour.

[50] DW3 as the head of warden in SMKAKK testified that no complain had been received from the minor, plaintiffs or any student from SMKAKK that the minor was assaulted by a group of students. The minor victim ('PW1') admitted that after the two incidents, he just keeps quiet and did not inform the school or the wardens.

[51] DW3 had testified that actions were taken by the school management in organising programs related to safety and discipline of the students in the boarding school. One of it is 'Program Jom ke Sekolah dan Pelancaran Peti Aduan Disiplin dan Taklimat Anti Buli oleh Pegawai PDRM on16 February 2017' (see DWS3 — pp 389–393 of ROA Part B). The programs that was carried out by the school and reminders are indeed necessary to ensure the safety of the pupils and to demonstrate that the first and second defendants had taken reasonable care to prevent injuries from being inflicted on the pupils including the minor whilst being in the school premises and the dormitory.

[52] Having considered the available evidence, I am satisfied that there is no reason to disturb the finding of facts of the learned sessions court judge above. The first and second defendants had discharged their duties by organising programs related to safety and discipline, assigning and supervising wardens to be on duty everyday including the day of the incidents ie 17 June 2017 and 10 July 2017 to supervise all pupils at the said dormitories/school and to ensure the safety of all pupils including the minor.

FAILURE TO CONSIDER O 15 R 6(2)(b) OF THE RULES OF COURT 2012

[53] The plaintiffs averred that the learned sessions court judge had erred in law and in fact in holding that no finding and/or order shall be made against the DW4 and DW5 as the plaintiffs failed to made the defendants' witness 4 and 5 (DW4 and DW5) as a party by failing to consider O 15 r 6(2)(b) of the Rules of Court 2012 that the court may on such terms as it thinks just and either of its own motion order any person who ought to have been joined as a party to be added as a party.

[54] Order 15 r 6(2) of the Rules of Court 2012 ('the ROC 2012') is the provision on misjoinder and non-joinder of parties.

> Order 15 of Rules of Court 2012:
>
> 6(2) Subject to this rule, *at any stage of the proceedings* in any cause or matter, the *court may on such terms as it thinks just* and either of its own motion or on application —

(a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added as a party, namely —

(i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

An application by any person for an order under para (2) adding him as a party shall, except with the leave of the court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.

A person shall not be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

[55] Order 15 r 6(2) of the Rules of Court 2012 gives wide discretion to the trial judge to grant or refuse the order of making a person a party with the exception that such order cannot be made to add a person as a plaintiff without his consent. Further, application to add a person as a party can be made at any stage of the proceeding.

[56] In *Shell Malaysia Trading Sdn Bhd v Leong Yuet Yeng & Ors* [1990] 3 MLJ 254 it was held:

> Order 15 r 6 of the Rules is a rule which is meant to prevent an action from being defeated by the misjoinder or non-joinder of plaintiffs or defendants and allows, subject to certain principles, for the addition, substitution or striking out of persons as plaintiffs, similarly of defendants, intervention of persons not parties to the action and for misnomer. But the power of the court to grant such amendment under that rule is discretionary and I agreed with counsel for the defendants that O 15 r 6 must necessarily only apply to proceedings where the substitution of any of the parties to the cause or matter was made before final judgment.

[57] Throughout the proceeding no application had been made by the plaintiffs in the present case to add a person(s) ie DW4 and DW5 as defendants to the proceeding.

[58] Before the trial, the plaintiff had raised eight issues to be tried before the learned sessions court judge (refer pp 11 and 12 of the supplementary record of appeal) in this suit and the issues are confined on the liability of the first and second defendants, and on the issues of vicarious liability of the third, fourth, fifth and sixth defendants.

[59] It is trite law that the party is bound by its pleading. In *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188 it was held that:

> In fact, the Court of Appeal itself has reiterated this in *Amanah Butler (M) Sdn Bhd v Yike Chee Wah* [1997] 1 MLJ 750; [1997] 2 CLJ 79 where Gopal Sri Ram JCA (as he then was) said:
>
> > It is trite law that a party is bound by its pleadings ...
> >
> > [35] On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

[60] I am with the learned federal counsel that the defendants had discharge its duty by calling their witnesses and the plaintiffs had opportunity to cross-examine the witnesses in order to prove its case. The plaintiffs then can make application to the court to add any person to include DW4/DW5/DW6 or Ustaz Halim as defendants to the suit by virtue of O 15 r 6 of the Rules of Court 2012 at any time during the trial but it was not done by the plaintiffs.

[61] Indeed the plaintiffs had all avenue to prove its case and bring the party ie the tortfeasor to the proceeding that the plaintiffs had waived. The plaintiffs could not now blame it back to the court not exercising its discretion to add any persons as a party when the plaintiffs itself chose not to do so.

[62] The learned sessions court judge had evaluated the totality of the evidence and came to a finding that DW5 and Ustaz Halim who were the wardens on duty that night should have taken the necessary action to supervise the students. The learned sessions court judge was correct when she made a finding of no order shall be made against DW5 and Ustaz Halim after evaluating the evidence from plaintiffs and defendants witnesses (refer p 53 of the supplementary records of appeal) neither did the learned sessions court judge made any order to add DW6 and DW5 as a party to the suit after the case has completed.

[63] Therefore, it is clear that the learned sessions court judge has discretion to exercise under O 15 r 16(2) of the Rules of Court when only it thinks just. In this case, the learned sessions court judge has acted on her discretion by not adding any persons as a party to the suit.

THE BULLY INCIDENTS TO THE MINOR'S ROOMMATE PREVIOUSLY

[64] It was averred that the learned sessions court judge had erred in law and in fact when rejecting the evidence of the minor on the bully incidents that happened to his roommate previously in SMKAKK despite the first defendant testified that bully incidents on 17 June 2017 and 10 July 2017 were not the first to happen in SMKAKK.

[65] The minor, PW1, in his witness statement (exh 'PWS-1') in question and answer Nos 96, 97, 99, 110 and 111 stated that (pp 59–60; p 63 ROA):

> Q.96: Apa yang kamu lakukan selepas kedua-dua kejadian tersebut?
>
> A: Saya cuma berdiam diri.
>
> Q.97: Kenapa?
>
> A. Sebab berasa takut kerana ugutan dan tidak percaya terhadap pihak sekolah.
>
> Q.99: Kenapa kamu tidak percaya terhadap pihak sekolah?
>
> A: Sebab ada kes buli sebelum saya, iaitu roommate saya Akmal Adam dibuli, saya ingatkan suda selesai.
>
> Q.110: Kenapa kamu tidak bagitahu warden yang kamu kena buli?
>
> A. Saya juga tidak percaya kepada warden kerana kes Akmal Adam. Patutnya selepas kes buli Akmal Adam itu, warden sepatutnya sentiasa berada di asrama.
>
> Q.111: Kenapa kamu tidak beritahu ibu bapa kamu juga?
>
> A. Sebab saya tahu kalau bagitahu pun ibu bapa saya, saya tetap akan dibuli. Sebab macam si Akmal Adam, selepas ibu bapa dia tahu dia dibuli, dan juga sudah kes polis, masih juga dia dibuli.

[66] Though DW1 testified that bully incidents on 17 June 2017 and 10 July 2017 were not the first to happen in SMKAKK, it is unclear from the minor's testimonies above whether the minor actually saw the incident of his roommate Akmal Adam being bullied or being told about the incident. The best evidence would be from the minor's roommate, Akmal Adam. Hence the learned sessions court judge was correct in her finding when she said that 'the plaintiffs did not call the said roommate or his parents to support the plaintiffs' allegation'.

A THE MINOR'S LOCKER WAS BROKEN AT HIS DORMITORIES AND HIS BELONGINGS WERE STOLEN

[67] Further it was averred that the learned sessions court judge had erred in law and in fact in failing to consider the testimony of DW5 when on the 30 July 2017, which was after the said two bully incidents, the minor's locker was broken at his dormitories and his belongings ie cash, shoes, and clothes were stolen and no action was taken by the wardens.

[68] The incident of the minor's locker was broken at his dormitories was a separate incident that took place after the bully incidents.

[69] As can be seen from the grounds of judgment, the learned sessions court judge had considered at length the evidence before her in relation to the bully incident on 17 June 2017 and 10 July 2017 against the minor. The issue that should be considered by the learned sessions court judge is that whether the defendants named by the plaintiffs has acted negligently on both days of the bully incidents.

[70] The learned sessions court judge was correct in her decision that the first and second defendants had provided sufficient supervision and reasonable care for the safety of all students including the minor by organising the programs and reminders and assigning wardens to be on duty everyday including the dates when the bullying incidents happened.

[71] Their duty is not a duty of insurance against harm but only a duty to take reasonable care for the safety of the pupil (see *Government of Malaysia & Ors v Jumat bin Mahmud & Anor*).

G DELETING THE VIDEO OF THE BULLY INCIDENT ON 10 JULY 2017

[72] It was further averred that the learned sessions court judge had erred in law and in fact in failing to consider the testimony of DW2 that he was instructed during the meeting of Lembaga Sekolah to delete video of the bully incident on 10 July 2017 despite PW1 had insisted the DW2 to supply the copy of the said video for the purpose of police investigation.

[73] The learned federal counsel submit that DW2 action in deleting the said video was not intended to deny and hide anything about the bully incident because after the complaint was made by the plaintiffs, immediate action has been taken and all the students who are involved have already been punished accordingly.

[74] It was further submitted that the learned sessions court judge was never wrong when she dismissed the plaintiffs' claim against the defendants although there was evidence from DW2 about the video as the learned sessions court judge had not evaluated the evidence before her in isolation and confined only on the issue of the said deleted video.

[75] Indeed the learned sessions court judge had the opportunity at first instance in assessing the evidence and demeanour of all the witnesses before her. It is the learned sessions court judge finding of fact on this issue and the appellate court should be slow in interfering the finding of fact by the trial judge unless there is an error (see *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441).

CAUSATION

[76] The law requires a causal connection between breach of duty and injury suffered before liability is established in an action for negligence. In other words, was the defendants' act the effective cause of the harm suffered by the plaintiffs?

[77] It is trite that when an injury or loss is caused to a third party by the wrongful act of an agent acting within the scope of his authority his principal is jointly and severally liable with him (see *Yeo Tin Sang v Lim Choo Kee* [1961] 1 MLJ 23).

[78] In order to render the employer liable for the employee's act and or conduct, it is also necessary to show that the employee is doing the act which occasioned the injury, was acting in the course of employment. To determine whether the act and/or conduct is said to be within the course of employment, the correct approach is to concentrate on the relative closeness of the connection between the nature of employment and the particular tort and to ask whether looking at the matter in the round, it was just and reasonable to hold the employer vicariously liable (see *Bernard v Attorney General* [2005] 2 LRC 561).

[79] The failure to name the tortfeasors (the students) in this suit has made the plaintiffs' claim herein collapsed ab initio. The plaintiffs' claim is doomed for failure from the very beginning. For a claim on wrongful tortuous act, the suing party is required to identify the wrongdoer ie the tortfeasor. In our instant case, the plaintiffs did not name the actual tortfeasors ie the students, but had named the head warden and headmaster instead. The first defendant and the second defendant are not the persons whom had caused injuries to the minor. The first and second defendants are not the actual wrongdoers to the minor. The first and second defendants are therefore could not be made liable.

[80] The plaintiffs have clearly stated the names of the students who were involved in the act of assaults and batteries in their statement of claim. However, these students are not made as parties in this suit. These students are not made as defendants and therefore the statement of claim is purely misconceived and bad in law as against all the defendants herein.

[81] The Federal Court in *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663; [2008] 2 MLRA 735 held that:

> ... on the proper construction of ss 5 and 6 of Act 359, in any claim in tort against the Government, the officer of the Government who was responsible for the alleged tortuous act must be made a party and his liability be established before the Government can be made liable vicariously as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against the officer personally can a claim be laid against the Government.

[82] As far as the first and second defendants herein, it is the plaintiffs' duty to prove the negligence on their part to ascertain the vicarious liability in accordance with the provision of ss 5 and 6 of the Government Proceedings Act 1956. As stated above evidence had been adduced that the first and second defendants have discharged their duty of care towards the minor and that the plaintiffs have failed to prove that they have breached such duty.

[83] Having perused the grounds of judgment of the learned sessions court judge, in my opinion, she has clearly evaluated the evidence before her and the relationship between the parties. It was observed by the learned sessions court judge that Government of Malaysia was not made as party in this suit being the employer for the first and second defendants. The issue of vicarious liability is totally subjected to ss 5 and 6 of Government Proceedings Act 1956. The Government of Malaysia must be named in this suit only then the issue of vicarious liability could be determined. Hence the third, fourth, fifth and sixth defendants cannot be held vicariously liable in this suit.

[84] As such, I am not persuaded that there are any merits in this appeal warranting intervention. The learned sessions court judge had not erred in facts and law in dismissing the plaintiffs' claim. In the upshot, I dismiss this appeal with no order as to costs.

THE PLAINTIFFS' APPEAL UNDER BKI-12ANCvC-12/8 OF 2019

[85] I shall proceed to consider plaintiffs' appeal against the dismissal of their notice of application (encl 90) for leave to add Government of Malaysia as co-defendant and that the plaintiffs be granted leave to amend their writ dated 8 February 2018, registered in Appeal No BKI-12ANCvC-12/8 of 2019.

[86] The learned sessions court judge in dismissing plaintiffs notice of application (encl 90) said that 'I am aware that application under O 15 r 6 can be applied at 'any stage of the proceeding'. However, I am of the view that it is way too late to add the Government of Malaysia as a party in this action as both parties have concluded their respective cases and that this case has already been fixed for decision after full trial. I am in agreement with the learned federal counsel that adding the Government of Malaysia at this late stage would be highly prejudicial to the rest of the defendants.

[87] The application to amend writ or pleading is not as a matter of a right of a party but it is left to the court's discretion to decide. This was decided by the Court of Appeal in the case of *Raphael Pura v Insas Bhd & Anor* [2001] 1 MLJ 49:

> ... An application for amendment of a writ or pleadings is not as a matter of a right of a party but is left to the judicial discretion of the court depending on the circumstances of each case (see p 55E–F).

[88] The guiding for rule for amendment is highlighted in the case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213; [1983] CLJ Rep 428 where three basic questions should be considered to determine whether injustice would or would not result namely:

(a) whether the application is bona fide;

(b) whether prejudice caused to the other side can be compensated by costs; and

(c) whether the amendments would not in effect turn the suit from one character into a suit from one character into a suit of another and inconsistent character.

[89] The recent principles of law with regard to amendment was highlighted in the case of *Hong Leong Finance Bhd v Low Thiam Hoe and another appeal* [2016] 1 MLJ 301 are as that:

(a) any application to amend a pleading which is made at a very late stage, the principles in *Yamaha Motor* ought not to be the sole consideration;

(b) this is because an order for compensation by payment of costs in such a case may not be an adequate remedy; and

(c) the appellant bears the burden of producing material and cogent reasons to explain why the change was sought so late and was not sought earlier.

[90] In the present case, the plaintiffs made the application to amend the statement of claim at the advanced stage of the court proceeding in that after the witnesses had testified and parties have closed their case.

[91] The courts in Malaysia have consistently held that where there is a delay in making an amendment application, the onus is on the applicant to furnish a reasonable explanation for such a delay. They seem to have considered this as an additional factor to the *Yamaha Motor*'s rules.

[92] In our present case, the learned federal counsel submit that the plaintiffs failed to explain the delay and beside that it was a 'sudden realization', where the plaintiffs noticed that there is need to add the Government of Malaysia as a party to the suit after the court has instructed the plaintiffs to provide further authority to clarify on the issue of vicarious liability of the third, fourth, fifth and sixth defendants and that the Government of Malaysia was not named as the defendant in the action. And this failure to explain with sufficient reasonable grounds is amounting to 'lack of bona fide'.

[93] Non-compliance of the ss 5 and 6 of Act 359 is not merely technical non-compliance but rather it involves substantive law. Sections 5 and 6 of the Act closely relates to liability. Act 359 is a Federal Law which was duly *gazetted* therefore the plaintiffs should have known of the substantive law including the mandatory requirement of ss 5 and 6 of the Act.

[94] The 'heavy onus' is on the plaintiff's to justify the delay in filing the application to amend the statement of claim and adding the Government of Malaysia as the tortfeasors was not raised earlier in this proceeding.

[95] The plaintiffs failure to explain the delay and to comply with the mandatory requirement/trite law is clearly tactical manoeuvre to defeat the defendants stand in saying that the plaintiffs failed to comply with the requirement of mandatory/substantive and principle of trite law.

(See *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348; [1988] 1 CLJ Rep 606.)

[96] In the present case, the learned sessions court judge was correct in dismissing plaintiffs' notice of application (encl 90). She had considered the whole case on its merits in considering the application for amendment when she said 'In any event, even if I am wrong in my decision on Enclosure 90, I have ruled earlier that the plaintiffs have failed to prove their case on the balance of probability against the first and second defendants and consequently against the third, fourth, fifth and sixth defendants'.

[97] For the foregoing reasons, this appeal is also dismissed with no order as to costs.

CONCLUSION

[98] Having considered the record of appeals, memorandum of appeals, submissions by both the appellants and the respondents, I am satisfied that there are no merits to intervene the finding of the learned sessions court judge that the plaintiffs/appellants have failed to establish that the first and second defendants/respondents have breached their duty of care towards the minor in which the third, fourth, fifth and sixth respondents were said to be vicariously liable.

[99] The plaintiffs had also failed to justify the delay in filing the application under encl 90 to amend the statement of claim and adding the Government of Malaysia as the tortfeasors was not raised earlier in this proceeding.

[100] In the circumstances, the finding of the learned sessions court judge is affirmed and both appeals are hereby dismissed with no order as to cost.

Sessions court judge's finding affirmed; both appeals dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar